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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TIM TOTH,

Plaintiff,

v.

CAVALRY PORTFOLIO SERVICES, LLC

Defendant.

CASE NO. 2:13-cv-01397

**DEFENDANT CAVALRY PORTFOLIO
SERVICES, LLC'S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S COMPLAINT
PURSUANT TO FRCP 12(b)(6)**

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1 **I. Introduction**

2 In his Opposition, Plaintiff Tim Toth ("Toth") seeks to confuse the general definition of
3 a "communication" set forth in section 1692a(2) of the FDCPA¹ with the narrower definition of
4 an "initial communication" contained in section 1692g(a) of the FDCPA. The plain language
5 of section 1692g(a) requires that an "initial communication" must be "with a consumer." In
6 other words, an "initial communication" cannot be accomplished indirectly through a consumer
7 reporting agency, as Toth urges. Only the "initial communication with a consumer" triggers the
8 notice requirements under section 1692g.

9 Toth mistakenly argues that any "communication" through any "medium" triggers the
10 collector's duty to provide the notice under 1692g, and that Cavalry was required to send him
11 a section 1692g notice because it used the consumer reporting agencies as a "vehicle" to
12 convey information to him. He is wrong. If Toth's theory were embraced, there would be no
13 way for a collector to know when to send the section 1692g notice, because the collector could
14 not know when, if ever, the consumer reporting agency sent any information to the consumer.
15 The authority Toth relies on in his Opposition does not support his argument and is no longer
16 good law. Only the "initial communication with the consumer" triggers the notice requirements.

17 The Opposition shows that Toth cannot allege that Cavalry ever had an "initial
18 communication" directly with him, which is a prerequisite to Cavalry's obligation to send him
19 the section 1692g notice. Therefore, his claims under section 1692g fail. In addition, his
20 derivative claims under sections 1692e, 1692e(2), and 1692e(8), are not supported by any
21 independent allegations, and they all fail as well.

22 Although Toth states as an afterthought at the end of his brief that he would amend his
23 complaint if given leave, he has not explained how he could amend to state a valid claim.
24 Accordingly, Cavalry's Motion for Dismiss must be granted, without leave to amend.

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28 ¹ The Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*

1 **II. Argument**

2 Toth argues the “act of using the credit reporting bureaus as a vehicle for conveying
3 information to [Toth] subjected [Cavalry] to the requirements of 15 U.S.C. § 1692g’s notice
4 requirement.” See Opposition (Doc. No. 9), p. 4:8-10. He does not allege in his Complaint,
5 nor does he state in his Opposition, when Cavalry allegedly began reporting information about
6 him to the consumer reporting agencies. Nor does state when the consumer reporting
7 agencies allegedly conveyed any information to him, or what information was conveyed. Nor
8 does he explain how Cavalry would have known that any information had been conveyed to
9 him by the consumer reporting agencies. In other words, there are no allegations reflecting
10 how Cavalry went about using the consumer reporting agencies as a “vehicle” for
11 communicating with him.

12 In any event, Toth’s “vehicle” theory fails. Section 1692g(a) clearly states that the “initial
13 communication” must be “with the consumer.” 15 U.S.C. § 1692g(a). The plain language of
14 1692g(a) contradicts Toth’s argument that the initial communication can be made indirectly
15 using a “vehicle” such as the credit reporting agencies. Not surprisingly, Toth does not cite
16 to a single case to support this argument.

17 Toth relies on *Nichols v. Byrd*, 435 F. Supp. 2d 1101 (D. Nev. 2006) to argue that there
18 is a “spilt of authority” as to “what qualifies as a ‘communication’ for purposes of invoking the
19 requirements” of section 1692g. *Nichols* does not reflect any “split of authority” on that point,
20 and it is completely distinguishable from this case. If anything, *Nichols* supports Cavalry’s
21 argument that the “initial communication” must be made directly to a consumer.

22 The question in *Nichols* was whether a lawsuit filed by a collection attorney could be
23 an “initial communication” within the meaning of section 1692g. The defendant had filed a
24 collection complaint and directly served the consumer with a summons. See *Nichols*, 435 F.
25 Supp. 2d at 1103. The Court held that the defendant’s initiation of a lawsuit by serving a
26 summons directly to the consumer was an “initial communication” with the consumer that
27 triggered the notice requirements under section 1692g. See *Id.* at 1106.

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Nichols did not involve any credit reporting conduct by a debt collector, nor was there an allegation that the defendant's obligations under section 1692g were triggered because it communicated with the plaintiff indirectly. The complaint was served directly on the consumer. Here, Cavalry did not file or serve a lawsuit on Toth, nor did it communicate directly with him at any point. Unlike *Nichols*, this case does not concern whether a lawsuit can be either a "communication" generally under the FDCPA or an "initial communication" under section 1692g. *Nichols* actually supports Cavalry's argument because the defendant in *Nichols* communicated *directly* with the consumer by serving him. *Nichols* simply does not support the notion that 1692g can be triggered by furnishing information to a consumer reporting agency.²

Toth does not even attempt to address any of the cases cited in Cavalry's motion, which are directly on point here. Toth only mentions one case cited by Cavalry, *Edeh v. Aargon Collection Agency, LLC*, 2011 WL 2963855 (D. Minn. June 20, 2011), but he does not attempt to distinguish it. Instead, he mistakenly dismisses it by characterizing it as "unpublished" because it is only available on Westlaw. The fact that a decision is available only in a computerized database, such as Westlaw or LEXIS, does not mean the decision is "unpublished," let alone that it cannot be cited as precedential or persuasive authority.³

² Further, section 1692g has been amended to clarify that a formal legal pleading is not an initial communication. See 15 U.S.C. § 1692g(d) ("A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a) of this section.") Thus, *Nichols* is no longer good law on this point.

³ There is "little relevance" whether a decision "is included in a bound volume versus being available on-line." *Welch v. Unum Life Ins. Co. of Am.*, 649 F. Supp. 2d 1220, 1224 (D. Kan. 2009). Thus, decisions only available online carry equal weight to those published in books. See *Francesco v. Beacon Court Condominium*, 2009 WL 174184, *1 n.5 (S.D.N.Y. Jan. 6, 2009) (rejecting suggestion that district court decisions published only on Westlaw or LEXIS are not intended to carry precedential weight of district court decisions published in Federal Supplement or Federal Rules Decisions series). Whether a decision is "unpublished," and thus not citable, is controlled by court rule, not by where the decision can be found. As one court explained, quoting the Seventh Circuit, "[i]f there is no rule in the court rendering a decision limiting the precedential value of its opinions, those opinions may be cited and are entitled to whatever weight the persuasive force of their reasoning warrants." *Kingvision Pay Per View, Ltd. v. Boom Town Saloon, Inc.*, 98 F. Supp. 2d 958, 959 n.1 (N.D. Ill. 2000) (denying motion to strike pleading that cited decisions available only on Westlaw where no local rule barred citation), quoting *Aetna Cas. & Surety Co. v. Kerr-McGee Chem Corp.*, 875 F.2d 1252, 1255 n.2 (7th Cir. 1989). Toth has not identified any Court rule prohibiting citation to decisions available only in electronic databases such as

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Edeh, like the other cases cited in Cavalry's opening brief, all hold that the act of reporting a debt to consumer reporting agencies does not trigger the collector's notification obligations under section 1692g(a). See *Edeh*, 2011 WL 2963855 *4; *Robinson v. TSYS Total Debt Managment, Inc.*, 447 F. Supp. 2d 502, 508-09 (D. Maryland 2006) (summary judgment for defendant on § 1692g claim: allegation that Defendant "communicated the debt to Plaintiff's credit report," thus triggering obligation to send § 1692g notice, does not support § 1692g claim "because it is not a communication with a consumer"); *Horvath v. Premium Collection Servs., Inc.*, 2010 WL 1945717, *4 (D. Ariz. May 13, 2010) (unpublished) (dismissing claim under section 1692g; first amended complaint failed to allege debt collector ever communicated with plaintiff); *Pretlow v. AFNI, Inc.*, 2008 WL 345593, *1 (W.D. Va. Feb. 7, 2008) (dismissing § 1692g claim where plaintiff only alleged communications between defendant and consumer reporting agencies); *Kaiser v. Braje & Nelson, LLP*, 2006 WL 1285143, *4 (N.D. Ind. May 5, 2006) (granting summary judgment on § 1692g claim where all communications were with debtor's attorney, not with debtor).

By ignoring these arguments and the authorities, Toth essentially concedes he has no legal support for his claim. See *CR of Rialto, Inc. v. City of Rialto*, 975 F. Supp. 1254, 1263 (C.D. Cal. 1997); see also *Silva v. City of San Leandro*, 744 F. Supp. 2d 1036, 1050 (N.D. Cal. 2010).⁴

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Westlaw. Local Rule 7-3 does not prohibit citation to Westlaw, nor does it prohibit citation to unpublished cases. See LR 7-3.

⁴ Toth also misquotes language from a case that has nothing to do with credit reporting or with section 1692g, *Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993). The correct quotation from *Clomon* states "[a]t the outset, it should be emphasized that the use of any false, deceptive, or misleading representation in a collection letter violates § 1692e-regardless of whether the representation in question violates a particular subsection of that provision." See *id.* (emphasis added to show misquoted portion). *Clomon* analyzed communications made in a collection letter under section 1692e, and did not involve a section 1692g claim or any reporting activity by the debt collector. Toth's misquotation attempts to broaden the language from *Clomon* to apply to all communications and all sections of the FDCPA, by stating that "[a]t the outset, it should be emphasized that the use of any false, deceptive, or misleading representation in a communication with a debtor violates the FDCPA regardless of whether the representation in question violates a particular subsection of that provision." See Opposition (Doc. No. 9), p. 3:9-12 (emphasis added to show misquoted portion). That is not what the Court in *Clomon* stated, and Toth's misquotation is consistent with his general misunderstanding of the case law on point with his claims.

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1 Toth asks this Court to rule that whenever a collector furnishes information to a
2 consumer reporting agency, this amounts to an "initial communication with the consumer." Not
3 only is Toth's argument contrary to the plain language of the statute and the case law, it makes
4 no sense. Consumer reporting agencies do not transmit the information furnished by Cavalry
5 to consumers as a matter of course. Rather, consumer reporting agencies only provide
6 information to consumers if they make a request for the information. Nor do consumer
7 reporting agencies notify collectors like Cavalry when consumers have requested copies of
8 their reports. Thus, under Toth's theory, the consumer's decision to access his credit report
9 would control when the "initial communication" has occurred, but the collector would not know
10 it had occurred. Under this theory, a collector would never know when its obligation to provide
11 the section 1692g notice had been triggered.

12 The plain language of the statute controls here, and the statute makes sense. Once
13 a collector decides to communicate directly "with the consumer" the collector knows it has an
14 obligation under section 1692g to send that consumer the section 1692g validation notice
15 within 5 days of that initial communication.

16 Toth concedes in his Opposition that his claims under sections 1692e, 1692e(2), and
17 1692e(8) all derive from his theory of recovery under 1692g. As his section 1692g claims fail,
18 so do his claims under sections 1692e, 1692e(2), and 1692e(8). The Complaint should be
19 dismissed.

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1 **III. Conclusion**

2 For the foregoing reasons, Cavalry respectfully requests that the Court issue an Order
3 dismissing the Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.
4 Toth has not even attempted to show that he can amend his Complaint to state a valid claim,
5 and therefore the Complaint should be dismissed with prejudice.

6 Dated this 3rd day of October, 2013.

7 LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

8 /s/ Jessica A. Green

9 By

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2013, service of the foregoing
**DEFENDANT CAVALRY PORTFOLIO SERVICES, LLC'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FRCP 12(b)(6)** was made
upon each party in the case who is registered as an electronic case filing user with the Clerk,
pursuant to Fed. Rule Civ.P.5(b)(3), and Local Rule 5-4, as follows:

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